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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 5/13/2024 10:34 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Ramon J. Maestas
Chief Clerk

4 v.

No. A-1-CA-41586

5 **WALTER FLORES,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY**

8 **John P. Sugg, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Brian Parrish, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **DUFFY, Judge.**

18 {1} This matter was submitted to this Court on the brief in chief pursuant to the

19 Administrative Order for Appeals in Criminal Cases from the Second, Eleventh, and

20 Twelfth Judicial District Courts in *In re Pilot Project for Criminal Appeals*, No.

21 2022-002, effective November 1, 2022 (the Administrative Order). Having

22 considered the brief in chief, concluding the briefing submitted to this Court

1 provides no possibility for reversal, and determining that this case is appropriate for
2 resolution on Track 1 as defined in the Administrative Order, we affirm for the
3 following reasons.

4 {2} Defendant is appealing his convictions for aggravated battery with a deadly
5 weapon and aggravated assault with a deadly weapon. On appeal, he challenges the
6 sufficiency of the evidence to support his convictions, and he claims that defense
7 counsel provided ineffective assistance of counsel.

8 **Sufficiency of the Evidence**

9 {3} “The test for sufficiency of the evidence is whether substantial evidence of
10 either a direct or circumstantial nature exists to support a verdict of guilty beyond a
11 reasonable doubt with respect to every element essential to a conviction.” *State v.*
12 *Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and
13 citation omitted). The reviewing court “view[s] the evidence in the light most
14 favorable to the guilty verdict, indulging all reasonable inferences and resolving all
15 conflicts in the evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-
16 009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We disregard all evidence and inferences
17 that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M.
18 438, 971 P.2d 829. Substantial evidence is defined as “such relevant evidence as a
19 reasonable mind might accept as adequate to support a conclusion.” *State v. Salgado*,
20 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and

1 citation omitted), *overruled on other grounds by State v. Martinez*, 2021-NMSC-
2 002, 478 P.3d 880.

3 {4} In order to convict Defendant for aggravated battery with a deadly weapon,
4 the evidence had to show that Defendant shot Guiselle Guillen with a firearm, and
5 that he intended to injure her or another. [RP 313] In order to convict Defendant of
6 assault with a deadly weapon, the evidence had to show that Defendant shot at Ulises
7 Ontiveros with a firearm, that this caused Ulises to believe Defendant was about to
8 intrude on his bodily integrity or personal safety by touching or applying force in a
9 rude, insolent, or angry manner, and that a reasonable person would also have the
10 same belief. [RP 317]

11 {5} Here, the State presented evidence that 100-150 people were attending a
12 graduation party on the evening of May 27, 2022. [BIC 2] A fight broke out, and a
13 responding officer arrived and saw that Guiselle had been shot. [BIC 2] A number
14 of people at the scene claimed that they did not see what happened. [BIC 3]
15 However, witnesses at the trial testified that Defendant and Ulises got into an
16 argument, and Defendant pulled out a gun just before the gun went off. [BIC 8-9]
17 Just prior to the shot being fired, Guiselle got in between Ulises and Defendant. [BIC
18 9] Ulises testified that Defendant walked up to him and said, “I’m going to kill you.”
19 [BIC 9] Although Ulises had made a pretrial statement that he wasn’t really scared
20 because he did not have time to think, he testified that he thought Defendant was

1 going to shoot him when he saw the gun spark. [BIC 9-10] Guiselle's testimony
2 largely corroborated Ulises's testimony, but she testified that she did not see the gun.
3 [BIC 9] Guiselle testified that she had been shot three times. [BIC 10] A shell casing
4 was thereafter matched to Defendant. [BIC 5, 12]

5 {6} With respect to both convictions, Defendant points to the conflicts in the
6 stories of the various people at the party. [BIC 12] It does not appear that most of
7 these people ended up as witnesses. In any event, to the extent that there were some
8 discrepancies in the testimony presented at trial, it was the jury's role to resolve these
9 conflicts. *See State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482
10 (recognizing that it is for the fact-finder to resolve any conflict in the testimony of
11 the witnesses and to determine where the weight and credibility lie). In this case the
12 eyewitness testimony, along with the shell casing evidence, was sufficient to support
13 both convictions.

14 {7} With respect to the assault conviction, Defendant claims that the State failed
15 to establish that Ulises was in subjective fear of imminent harm because he did not
16 believe that Defendant would shoot. [BIC 13-14] However, the jury was free to reject
17 Ulises's testimony that he was not in subjective fear of being shot; the jury could
18 attribute this to a disingenuous attempt to project toughness. In any event, Ulises
19 clarified in his testimony that he did in fact believe that Defendant was going to
20 shoot him when he saw the firearm spark. [BIC 9-10]

1 {8} With respect to the battery conviction, Defendant claims that there was no
2 evidence to support Guiselle’s testimony that she had been shot three times. [BIC
3 15] However, there was no need to prove that she was shot three times, since
4 Defendant’s conviction only required the evidence to show that Guiselle had been
5 shot once. [RP 313]

6 **Ineffective Assistance of Counsel**

7 {9} Defendant claims that defense counsel was ineffective. [BIC 16] In order to
8 make a prima facie case of ineffective assistance of counsel, “a defendant must show
9 error on the part of counsel and prejudice resulting from that error.” *State v.*
10 *Schoonmaker*, 2008-NMSC-010, ¶ 32, 143 N.M. 373, 176 P.3d 1105, *overruled on*
11 *other grounds by State v. Consaul*, 2014-NMSC-030, 332 P.3d 850. Such a finding
12 requires that the attorney’s conduct fell below that of a reasonably competent
13 attorney. *Id.*

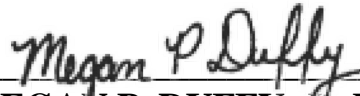
14 {10} Defendant claims that defense counsel was ineffective because he should have
15 called additional witnesses. [BIC 17-18] It is well established that “[t]he decision
16 whether to call a witness is a matter of trial tactics and strategy within the control of
17 trial counsel.” *Lytle v. Jordan*, 2001-NMSC-016, ¶ 47, 130 N.M. 198, 22 P.3d 666
18 (internal quotation marks and citation omitted). Defendant also claims that defense
19 counsel did not thoroughly investigate the case, and simply “phoned it in.” [BIC 22]
20 This generalized assertion is insufficient to establish prejudice. *Cf. State v. Ortega*,

1 2014-NMSC-017, ¶¶ 57, 59, 327 P.3d 1076 (rejecting claims of ineffective
2 assistance of counsel because the arguments were speculative).

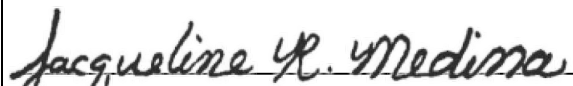
3 {11} With this in mind, we acknowledge that “[e]vidence of an attorney’s
4 constitutionally ineffective performance and any resulting prejudice to a defendant’s
5 case is not usually sufficiently developed in the original trial record.” *State v.*
6 *Crocco*, 2014-NMSC-016, ¶ 13, 327 P.3d 1068. As Defendant observes, a habeas
7 corpus proceeding can be the proper venue for Defendant to pursue his claim. [BIC
8 23-24] *See State v. Martinez*, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31
9 (stating that “[t]his Court has expressed its preference for habeas corpus proceedings
10 over remand when the record on appeal does not establish a prima facie case of
11 ineffective assistance of counsel”).

12 {12} For the reasons set forth above, we affirm.

13 {13} **IT IS SO ORDERED.**

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15 _____
MEGAN P. DUFFY, Judge

16 **WE CONCUR:**

17 
18 _____
JACQUELINE R. MEDINA, Judge

19 
20 _____
GERALD E. BACA, Judge